

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

G.F. PATERSON FOODS, LLC,
Employer,

and

Case No. 22-RD-210352

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 464-A,
Intervenor—Union,

and

ELLIOTI TAPIA,
Petitioner.

PETITIONER’S REQUEST FOR REVIEW

STATEMENT OF FACTS

Petitioner Elliotti Tapia (“Petitioner” or “Tapia”) is employed by G.F. Paterson Foods, LLC (“Gala Fresh”) in a bargaining unit exclusively represented by UFCW Local 464A (“UFCW”). On or about November 22, 2017, Tapia filed a decertification petition with Region 22 on behalf of Gala Fresh employees, pursuant to their rights under Section 9 of the National Labor Relations Act, 29 U.S.C. § 159 (“NLRA” or “the Act.”). Tapia’s decertification petition, signed by 47 of 66 Gala Fresh employees, exercised the employees’ statutory rights to remove UFCW as the workers’ exclusive representative, and requested a December 19-20, 2017 election.

Under the terms of a September 28, 2016 settlement agreement, Region 22 required Gala Fresh to recognize and bargain collectively with UFCW as the employees’ exclusive bargaining representative. On December 17, 2016, Gala Fresh and UFCW commenced contract negotiations, but Gala Fresh workers never had the opportunity to exercise their statutory rights

to vote for themselves whether UFCW should be the employees' representative. Rather, Region 22 foisted UFCW on Gala Fresh employees following its determination that Gala Fresh was a successor employer. On or about May 17, 2017, Gala Fresh employees presented a letter to Gala Fresh and UFCW declaring that they "do not want to be represented by the UFCW LOCAL 464A Union, do NOT want to join the Union, and do not support the Union in any manner." Collective bargaining negotiations between Gala Fresh and UFCW continued.

Beginning in October 2017, Gala Fresh workers collected signatures from 70% of bargaining unit employees requesting that the Region conduct a decertification election. On or about November 22, 2017, Tapia filed the decertification petition with Region 22, marking the second time this year Gala Fresh employees declared their disaffection and lack of support for UFCW. On two separate occasions in 2017, Gala Fresh workers sent a plain and clear message to the company and the union: They do not want UFCW Local 464A as their exclusive representative. On or about November 29, 2017, UFCW filed a Statement of Position stating that Region 22 should block the petition based on unfair labor practice allegations filed earlier that year in 22-CA-196390 (filed April 6, 2017), 22-CA-199467 (filed May 25, 2017), and 22-CA-208888 (filed October 30, 2017) (collectively, "the Charges"). On November 30, 2017, Region 22 issued an order postponing indefinitely the hearing on Tapia's RD petition, "in order to allow time to investigate and determine the impact, if any, on [the decertification petition], of the unfair labor practice charges filed in Cases 22-CA-196390, 22-CA-199467, and 22-CA-208888."

ARGUMENT

Petitioner urges the Board to overrule its “blocking charge” policies to protect the true touchstone of the Act—*employees’* paramount right of free choice under Section 7. *Int’l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961) (holding that “there could be no clearer abridgment of § 7 of the Act” than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation); *see also Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). By blocking Gala Fresh workers’ decertification election, the Regional Director diminished the employees’ *statutory rights* to decide their workplace representative *for themselves* under Sections 7 and 9 of the Act, 29 U.S.C. §§ 157, 159.

Pursuant to Board Rules and Regulations §§ 102.67 and 102.71, Tapia submits this Request for Review of the Regional Director’s order because it raises compelling reasons for reconsideration of a Board rule or policy. Requests for Review should be granted when “(1) ... a substantial question of law or policy is raised ... [or] (2) [t]here are compelling reasons for reconsideration of an important Board rule or policy.” *See* NLRB Rules and Regulations § 102.71(a)(1), (2). In short, this Request for Review, challenging the Board’s “blocking charge” rules, raises questions of exceptional national importance. Tapia’s case demonstrates compelling reasons for the Board to reconsider blocking charge rules (i.e., vindicating employee free choice).

Petitioner asks the Board to: grant her Request for Review; reactivate her decertification election petition; and overrule, nullify, or substantially revise its “blocking charge” policies. Such action by this Board will restore protection for employees’ rights to choose or reject unionization at a time they choose by removing the current Board-created shelter for entrenched and recalcitrant unions that obstruct employee rights by unilaterally blocking elections, and cling

to power despite actual and compelling evidence of their loss of employee support. This Request for Review should be granted because the Board's "blocking charge" rules deny employees their fundamental rights under NLRA Sections 7 and 9, and allow unions to "game the system" and strategically delay all decertification elections, even as the Board's new Representation Election Rules, *see* 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101, 102, and 103), rush all certification petitions to an election with no "blocks" allowed under any circumstances. *See id.* at 74430-74460. The Board should put an end to this double-standard, order this election to proceed at once, and follow the lead of Chairman Miscimarra, who has urged a wholesale revision of the "blocking charge" rules. *See Cablevision Systems Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (finding that Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all."); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) (citing the "NLRA's core principle that a majority of employees should be free to accept or reject union representation").

The Board should grant Tapia's Request for Review and order Region 22 to hold the decertification election because the current "blocking charge" rules are inconsistent with the Act and should be overruled. Alternatively, the Board should require the Region to conduct *Saint-Gobain* hearings as a precondition to blocking Tapia's decertification election. *See Saint-Gobain Abrasives, Inc.*, 342 NLRB 434 (2004).

I. The current “blocking charge” rules are inconsistent with the purposes of the Act and should be overruled.

A. The Board’s “blocking charge” rules deprive employees of statutory rights without explicit statutory authority.

The Regional Director’s “blocking charges” circumvents Gala Fresh employees’ statutory rights without explicit statutory authority, demonstrating that such blocking rules are inconsistent with the purposes of the Act. Employees enjoy a statutory right to petition for a decertification election under NLRA Section 9(c)(1)(A)(ii), and that right should not be trampled by arbitrary rules, “bars,” or “blocking charges” that prevent the expression of true employee free choice. By blocking Gala Fresh workers’ decertification election, the Regional Director diminished the employees’ *statutory rights* to decide their workplace representative *for themselves* under Sections 7 and 9 of the Act, 29 U.S.C. §§ 157, 159.

Employee free choice under Section 7 is the paramount interest of the NLRA. *See Pattern Makers League v. NLRB*, 473 U.S. 95, 104 (1985); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the “core principle of the Act”) (quotation marks and citation omitted). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 725-26 (2001). Industrial stability is enhanced when employees vote in secret ballot elections, since this ensures that employees actually support the workplace representative empowered to speak exclusively for them. Yet, the “blocking charge” rules sacrifice this statutory right of employee free choice based on the whim and strategic considerations of an unpopular incumbent union clinging to power.

Despite employees' Section 7 and 9(c)(1)(A)(ii) rights to hold a decertification election, the Board has adopted "presumptions" that prevent employees from exercising their statutory rights whenever a union files so-called "blocking charges." There is no statutory basis for blocking charges. Nowhere did Congress explicitly authorize the Board to ignore Section 9(e) of the Act, 29 U.S.C. § 159 (e), which clearly states that with the filing of a petition by 30% of the bargaining unit employees, "the Board shall take a secret ballot of the employees in such unit." The only express limitation on the Board's mandate to conduct and certify such elections is the provision that prevents elections from being held within 12 months of a previous election. The Act contains no other limitations. No matter how offensive the unfair labor practice may be, the election should be held once there is a showing of 30% seeking an election, with challenges, or objections, if any, sorted out thereafter.

The Board's "blocking charge" practice is not governed by statute. Rather, its creation and use lies within the Board's discretion to effectuate the policies of the Act. *Amer. Metal Prods. Co.*, 139 NLRB 601, 605-05 (1962); *see also* NLRB Casehandling Manual (Part Two) Representation Sec. 11730 *et seq.* (setting forth the "blocking charge" procedures in detail). Though discretionary and not governed by statute, the "blocking charge" rules prevent employees from exercising their paramount Section 7 right to choose or reject representation, which is not a proper use of the Board's discretion.

Decertification proceedings are almost invariably and automatically held in abeyance whenever a union files unfair labor practice charges against an employer and a Region invokes these "presumptions." Invoking such "presumptions" to halt decertification elections serves only to entrench unpopular incumbent unions, thereby forcing an unwanted representative onto employees. The Board exists to conduct elections and thereby vindicate employees' rights under

the Act to choose or reject union representation, not to arbitrarily suspend election petitions at the behest of unions who fear an election loss. *Cf. General Shoe Corp.*, 77 NLRB 124, 126 (1948) (holding that the Board should exercise the power to set aside an election “sparingly” in representation cases because it cannot “police the details surrounding every election” and the secrecy in Board elections empowers employees to express their true convictions).

In the absence of blocking charges there are safeguards to election fraud or significant unlawful employer activity. Objections can be made and a post-election hearing held to determine the validity of those objections and whether they impacted employee free choice. The solution to conduct that allegedly interferes with a free and fair election is not to prevent the election from occurring whenever blocking charges exist. Indeed, that can be a very time-consuming process due to complaint issuance, trial, and appeals. Such delays can drag on for years, violating employees’ rights to free choice.

The Board’s practice of delaying and denying elections has faced judicial criticism. In *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960), the Fifth Circuit stated: “[T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.” *See also NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75 (7th Cir. 1968).

In the context of challenges to a certification petition, the Board holds the election first and settles any challenges after. Yet, the Board’s “blocking charge” rules disparately impact and discriminate against employees who wish to remove an unwanted union. The Board should take administrative notice of its own statistics, which show that 30% of decertification petitions are

“blocked,” whereas certification elections are *never* blocked for any reason. See NLRB, Annual Review of Revised R-Case Rules, <https://www.nlr.gov/sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf>. If the Board can rush certification petitions to prompt elections by holding all objections and challenges until afterwards, it can surely do the same thing for decertification petitions. 79 Fed. Reg. 74308, 74430-74460 (Dec. 15, 2014). It is time for the Board to eliminate its discriminatory “blocking charge” rules, which apply solely to those employees seeking to refrain from supporting a union. The Board must create a system for decertification elections whereby those employees are afforded the same rights as employees seeking a certification election to support a union. The solution, if there is any misdeed, is to rely on the Board’s objection policies with respect to elections.

B. The Region’s “blocking charges” deprive Gala Fresh employees’ rights to decide representation for themselves despite an overwhelming mandate from the bargaining unit, thus demonstrating why the current rules should be overruled.

The Region’s blocking charges deprived Gala Fresh employees of their statutory right to petition for a decertification election under NLRA Section 9(c)(1)(A)(ii), denying them the opportunity to decide representation for themselves. The Regional Director’s actions in this case demonstrate how the blocking charge rules restrain and delay employees’ rights to representation, entrenching an unpopular union as a consequence. Despite an overwhelming mandate from 70% of bargaining unit employees, Region 22 postponed election proceedings indefinitely, based upon mere speculation that there *might* exist some connection between the decertification petition and the company’s alleged unfair labor practices, no matter how compelling the employee support for the petition or how remote and attenuated the charges. The Region’s application of discretionary blocking charges restrains Gala Fresh employees’ statutory rights, treating Petitioner and her coworkers like sheep rather than responsible, free-thinking

individuals entitled to make their own choice about unionization. Not only is this presumption wrong, it evinces institutional distrust and second-guessing best described by Judge Sentelle's concurring opinion in *Lee Lumber*.

In *Lee Lumber*, an overwhelming percentage of bargaining unit employees signed a petition asking for a chance to exercise their free choice, but years later, still did not have the election they petitioned for due to charges filed against the employer. Judge Sentelle's concurring opinion highlighted the inequitable nature and "administrative arrogance" of the Board's blocking charge presumptions:

[I]n cases like the present one, the Board, in the face of that core principle [of employee free choice], presumes that the employees are incapable of exercising their core right because they might have been deceived as to the union's strength by the employers' apparent willingness to challenge the union. If that is the case, and a union is worth having, then why couldn't the unions so inform the employees out of it? To presume that employees are such fools and sheep that that they have lost all power of free choice based on the acts of their employer bespeaks [a] sort of elitist Big Brotherism The Board presumes that the employers' refusal for a few days to bargain fooled those poor deluded employees to such a point that neither the Union nor anyone else could possibly educate them of the truth known only to their Big Brother, the Labor Board And yet, the Board feels perfectly righteous in so disenfranchising the employees in this case for the simple reason that they are employees. That is, the Board apparently has reasoned that the working class is composed of individuals not competent to determine their own best interest or even know their own minds.

Lee Lumber, 117 F.3d at 1463-64 (Sentelle, J., concurring).

Likewise, the Region's application of the same presumptions offends the Act's core principles of employee free choice. Simply put, Gala Fresh employees wish to be free from UFCW representation, irrespective of any alleged Employer infractions. Gala Fresh employees do not like UFCW, and will vote it out regardless of the employer's actions or lack of progress at the bargaining table. The Board's policies deny decertification elections even where the

employees are not aware of the alleged employer misconduct, and where their disaffection from the union springs from wholly independent sources.

Gala Fresh employees opposed UFCW's representation since at least September 28, 2016, when Region 22 foisted the union upon the employees pursuant to a settlement agreement. Gala Fresh employees never voted for UFCW, and were saddled with a union that they never supported; thus, the employees' disaffection with UFCW predated collective bargaining negotiations. Gala Fresh employees engaged in concerted efforts throughout the year to oppose UFCW's representation, irrespective of the union's charges against the company. On two separate occasions in 2017, the Gala Fresh employees overwhelmingly and unequivocally declared their lack of support for UFCW, and have now filed a decertification petition in accordance with their rights.¹ The "blocking charge" rules prevent Gala Fresh employees from exercising their statutory rights to remove a union that they never voted for and do not support. Depriving the Gala Fresh employees of their right to an election is a clear abridgment of their rights.

Tapia's case demonstrates the absurdity of the current "blocking charge" policy because neither the Petitioner nor Gala Fresh took actions that interfered with a free and fair election. Despite the Region's speculation, the Charges against the company do not allege that Gala Fresh tainted *the decertification petition*, or interfered with employees' free choice to join in decertification activities. As a preliminary matter, the charges in 22-CA-196390 and CA-199467, filed approximately 5-6 months before Gala Fresh employees signed and filed their petition, are

¹ "[A]n incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition or other valid challenge to the union's majority status." *MV Transp.*, 337 NLRB 770, 770 (2002) (emphasis in original); *FJC Sec. Servs.*, 360 NLRB 929, 929 (2014) (Board Member Miscimarra stating in his concurring opinion that he would adhere to the standard established in *MV Transportation*). Gala Fresh workers repeatedly rebutted any presumption of majority support that might have existed for UFCW.

remote and substantively disconnected from the employees' decertification activities. Moreover, such overwhelming support from 70% of bargaining unit employees negates any question of improper influence. In Case 22-CA-196390, UFCW alleged that Gala Fresh decreased working hours without bargaining. Presumably, however, this would motivate employees *to support* UFCW, not to decertify it. Clearly, the Gala Fresh employees want to remove UFCW *despite* charges that the company decreased work hours. UFCW also alleged that Gala Fresh foods rescinded that change without notifying and bargaining with the union, but that bargaining charge is also irrelevant to decertification. In Case 22-CA-199467, UFCW charged Gala Fresh with refusing to respond to UFCW's request for work rules, policies, and practices. An employer's failure to furnish information, however, does not taint an employee petition. *See Tenneco Auto, Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013) (finding employer's refusal to provide union addresses of replacement employees, requirement that employees obtain company permission before posting materials, and discipline of union advocate did not taint petition). In Case 22-CA-199467, UFCW alleged that Gala Fresh threatened employees with plant closure, and that an employee—involved with the May 2017 employee effort to voice their opposition to the union—was an agent of Gala Fresh.² Whatever merit these allegations might have, they simply do not involve the decertification petition, and involve attenuated circumstances that predate the petition by more than 5-6 months. In Case 22-CA-208888, the Region concluded that Gala Fresh frustrated the bargaining process by employing a bargaining representative lacked authority to make bargaining decisions. Case 22-CA-208888 thus involves bargaining charges that are wholly irrelevant to the decertification petition. In any event, if UFCW contents that

² At the time of her involvement, the employee believed that she was a member of the bargaining unit, and did not know or have reason to believe that she was excluded, as the scope of the bargaining unit was undefined and unascertainable for most employees. Nor did she have any reason to believe that she was an agent of the employer. Whatever the merit of these allegations, there is no allegation or evidence that this somehow taints the *decertification petition*, assembled and filed 5-6 months later, with the support of 70% of bargaining unit employees.

these allegations influenced decertification activities, its proper recourse is to file post-election objections.

Even assuming, *arguendo*, that Gala Fresh actually committed the violations alleged in the unfair labor practice charges, “[t]he wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees.” *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (2001) (Member Hurtgen, dissenting); *see also Cablevision Systems Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review) (Member Miscimarra, dissenting). In sum, Region 22 should be ordered to proceed to an immediate election without further delay. The Region’s delay here could drag on for years, obstructing employees’ rights to free choice. The employees’ paramount Section 7 rights are at stake, and their rights should not be so cavalierly discarded simply because Gala Fresh is alleged to have committed a violation or made a technical mistake under the labor laws. The “blocking charge” rules restrain employees from exercising their Section 7 rights to choose or reject representation, which is not a proper exercise of the Board’s discretion.

II. Alternatively, the Board should require *Saint-Gobain* hearings as a precondition to blocking an election on the basis of the Union’s unfair labor practice charges.

The Regional Director deprived Petitioner Tapia and Gala Fresh employees of their Section 7 rights by blocking their decertification election without evidence that Gala Fresh’s alleged unfair labor practices influenced the vast majority of bargaining unit employees to petition for UFCW’s removal. The Region’s proper course of action is to schedule a hearing *after* the election, if and when the union files objections.

Alternatively, prior to blocking the election, the Regional Director could have required UFCW to prove the existence of a “causal nexus” at a *Saint-Gobain* evidentiary hearing. An unfair labor practice cannot block an election unless the Region conducts a *Saint-Gobain*

evidentiary hearing and the union demonstrates the “causal nexus” between the employer’s alleged unfair labor practices and the employees’ disaffection with the union. 342 NLRB at 434 (“[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection.”); *see also, Roosevelt Memorial Park, Inc.*, 187 NLRB 517, 517-18 (1970) (holding the party asserting the existence of a bar bears the burden of proof); *Saint-Gobain Abrasives, Inc.*, 342 NLRB at 434.

Region 22 summarily blocked election proceedings and will seemingly hold the proceedings in abeyance until it reaches some resolution with the Charges, perhaps after months of litigation and without providing Petitioner any opportunity to participate in any related hearings or investigations (e.g., by presenting evidence or witnesses). No neutral designee is reviewing UFCW’s allegations while also taking into consideration the Petitioner’s position. The Regional Director’s reflexive block of Petitioner’s decertification election proceeding arbitrarily restrained the exercise of Petitioner’s and her fellow employees’ Section 7 and 9 rights. The Regional Director cannot delay election proceedings in perpetuity until such blocking charges are fully-litigated or closed on compliance. *Id.*

CONCLUSION

The Board should grant Petitioner’s Request for Review and order the Regional Director to process promptly this decertification petition. It should also overrule or substantially overhaul its “blocking charge” rules that are used and abused to deny decertification petitions arbitrarily.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 14, 2017, he filed this PETITIONER'S REQUEST FOR REVIEW with the NLRB's e-filing system (to both the National Labor Relations Board office and the Regional Office), and also sent a true and correct copy of this document via e-mail to the following:

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